

Taylaran (Migration) [2018] AATA 4779 (8 October 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Darlyn Taylaran
CASE NUMBER:	1611079
DIBP REFERENCE(S):	BCC2015/1856532
MEMBER:	Fiona Meagher
DATE:	8 October 2018
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations; • cl.820.211(2)(c) of Schedule 2 to the Regulations; • cl.820.221(1) of Schedule 2 to the Regulations; and • cl.820.221(4) of Schedule 2 to the Regulations; • • Statement made on 08 October 2018 at 6:50pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – spouse or de facto partner – marriage certificate – consistent evidence of financial structure – shared household responsibilities – no children – previous two approved sponsorships – compelling circumstances – sponsor’s mother’s medical condition – role of caring for sponsor’s mother – breakdown of earlier relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 19 July 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 26 June 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied that the applicant demonstrated that she was the spouse or de facto partner of the sponsor. Further the sponsor had already successfully sponsored two previous partners, and therefore, in accordance with regulation 1.20J the sponsor is prevented from being a sponsoring partner unless there are compelling reasons. In this case, the delegate found that there were no such compelling reasons.
4. The applicant appeared before the Tribunal on 22 September 2017 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Sterling, the visa applicant's sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Tagalog and English languages.
5. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. Prior to the hearing the Tribunal received submissions from the Visa applicant's migration agent. Further submissions were received after the hearing including financial documentation with respect to the parties, a statement from the sponsor's mother, regarding the very significant support she receives from the applicant, and numerous statutory declarations attesting to the genuine nature of the relationship. These documents were in addition to the documents already before the Department, copies of which were also before the Tribunal.
8. The applicant is a 36-year-old citizen from the Philippines. The sponsor is a 74 year old citizen of Australia. The applicant's immediate family resides in the Philippines, and she also has some cousins in Bundaberg. The sponsor has been married twice before, on both occasions as a result of approved sponsorships one with respect to his former spouse, and one with respect to his former de facto partner..
9. The parties met through Filipino Cupid in about August 2014. They met in person in October 2014, when the sponsor visited the applicant and they holidayed together. The applicant arrived in Australia on a tourist Visa on 6 April 2015. The parties married on 20 June 2015, and made an application for a partner visa on 29 June 2015.

10. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files as well as the oral evidence provided by the parties at the hearing. The Tribunal has also taken into account the documents received from the applicant's migration agent after the hearing.
11. The Tribunal found the parties to be honest and straightforward in their evidence to the Tribunal. Their oral evidence was spontaneous, consistent and coherent and the Tribunal considers them to be credible.

Whether the parties are in a spouse or de facto relationship

12. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

14. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. On the evidence, a Queensland marriage certificate dated 20 June 2015, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

15. The Tribunal has considered the financial aspects of the relationship. The parties gave consistent evidence regarding the financial structure of the sponsor's self storage business, and how they distribute money from that business. The applicant receives an allowance from the sponsor, together with the carer's allowance which the sponsor receives to care for his 90 year old mother. The sponsor also gives the applicant additional money when she needs it. He also helps support and agricultural business the applicant has in the Philippines, and her business selling designer bags online. The applicant has a credit card, which is connected to the sponsor's, and she assists him in his businesses, especially the storage business. The sponsor also sells real estate and cars, and engages in property development.
16. The parties gave consistent evidence regarding the nature of the household. The applicant undertakes most of the household chores at home, including the cooking washing and housecleaning. The sponsor mows the grass and assists in cleaning the swimming pool. The applicant is responsible for the gardening, as she loves gardening, and the couple go shopping together.

17. The parties also gave consistent evidence regarding the social aspects of their relationship. They both explained that they had a date night each week together, that on Sunday they went to a restaurant or had fast food so that no one had to cook, and that they regularly took the sponsor's mother out. Both parties also explained that they go tenpin bowling together twice a week. The applicant told the Tribunal that the sponsor had made some new friends the Filipino communities in Brisbane, Browns Plains and Bribie Island through her. The sponsor said that in addition his hobbies include cars and boats. He said that the applicant has more friends than he does as she is very social. The parties also gave evidence that they had undertaken a cruise together for seven days in August 2000 16th to Noumea. The Tribunal notes that these matters are supported by statutory declarations from a number of friends of the couple.
18. In relation to the nature of the persons commitment to each other, the Tribunal notes that the relationship has now been on foot since 2014, approximately four years, and that the parties clearly show that they drew a degree of companionship and emotional support from each other, and see the relationship as long term. As well, both the applicant and sponsor are very involved in the care of the sponsor's elderly mother, including cooking and cleaning for her, assisting her with her mobility, taking her to doctors and other health related appointments, and generally assisting her and keeping her company. The Tribunal notes that there is effusive correspondence from the sponsor's mother, confirming the degree of assistance and support she receives from both the sponsor, and particularly the applicant. The sponsor's mother notes that without the applicant's assistance, she would not be able to maintain her current independent lifestyle – that is living in a cottage on the applicant and sponsor's block of land.
19. The Tribunal notes that the parties do not have children together. They gave consistent evidence that the sponsor told the applicant, before they married, that he did not want more children, as he already had children from his first and second marriages. The applicant said that she was somewhat sad about this, but on balance decided that it was not "a big deal". The sponsor noted, in that regard, that the applicant takes great pleasure from her nieces and nephews, as she does not have biological children of her own. The sponsor has children from both his previous marriages. The parties gave evidence that the sponsor is not in touch with his children from his first marriage, and that in relation to the children from his second marriage, the sponsor and the applicant have the care of those children regularly, as part of a parenting agreement.
20. The parties told the Tribunal in some detail about the inception and development of their relationship. The evidence they gave was consistent and comprehensive.
21. In all the circumstances, the Tribunal considers that the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons commitment to each other all support the parties being in a genuine and continuing relationship, having made a mutual commitment to a shared life to the exclusion of all others. Further the Tribunal is satisfied the parties live together. In coming to this conclusion, the Tribunal recognises that it had the benefit of taking lengthy evidence from the parties at hearing, as well as having further documentation available to it.
22. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
23. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.

Is the applicant sponsored?

24. Clause 820.211 requires at the time of application, the applicant meets one of several alternative sub criteria. These include 820.211(2)(c) which requires that the applicant was, at the time of application, sponsored by the sponsor, where such sponsor has turned 18; or where they have not, by the sponsor's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or an eligible New Zealand citizen, as defined by . 03 of the regulations.
25. At the time of decision, the applicant must continue to be sponsored by the sponsor, and the sponsorship must have been approved by the Minister and be still in force. Exceptions apply in certain circumstances where the sponsor has died, or family violence has occurred, or a child is involved. For visa applications made on or after 18 November 2016, the sponsor must also have consented for the Department to disclose to each applicant any conviction for a relevant offence, unless the conviction has been quashed or otherwise nullified, or where the sponsor has been pardoned with the effect that he or she is taken never to have been convicted of the offence: cl.820.221.
26. Approval of sponsorship is subject to limitations contained in r.1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship, and in r.1.20KA which sets a limit on the period before which certain Parent visa holders can sponsor another person for a Partner visa. There are further limits imposed by r.1.20KB in relation to sponsors charged with, or convicted of, certain offences where the visa application was made on or after 27 March 2010, and r.1.20KC for sponsors convicted of a relevant offence who have a significant criminal record in relation to the relevant offence where the visa application was made on or after 18 November 2016.
27. In the present case, the applicant was sponsored by the sponsor at the time of application, as evidenced by the sponsorship Form 40 SP provided with the application. The Tribunal is satisfied that the sponsor is over the age of 18 and is an Australian citizen. Therefore the time of application sponsorship requirement, cl.820.211(2)(c) is met.
28. At the time of decision, the applicant must continue to be sponsored by the sponsor, and the sponsorship must have been approved by the Minister and be still in force. Exceptions apply in certain circumstances where the sponsor has died, or family violence has occurred, or a child is involved. The Tribunal is satisfied that the applicant, at the time of decision, continues to be sponsored by the sponsor.
29. With respect to the limitations upon the number of people that a person can sponsor in a lifetime, and the minimum time that must lapse between each sponsorship, the Tribunal observes that the sponsor is limited to a total, in a lifetime, of two approved sponsorship nominations that lead to a grant of a partner Visa (or entry permit) or a Visa (or entry permit) granted on the basis of the domestic violence provisions. If there has been one previous sponsorship and nomination, or if the sponsor was granted a visa or entry permit as a result of being sponsored, a period of five years must have passed since the date of the earlier Visa application. These requirements apply unless the Minister, or the Tribunal on review, is satisfied that there are compelling circumstances affecting the sponsor: regulation 1.20J(2).
30. The expression "compelling circumstances" is not defined in the legislation. Whether there are compelling circumstances affecting the sponsor is a matter of fact and degree for the Tribunal to determine. The Tribunal must consider whether the circumstances are such that they evoke interest or attention in a powerful the irresistible way: *Babici v MIMIA* [2004] FCA 1645 or are "so powerful that they lead the [Tribunal] to make a positive finding that the [provision] should be waived": *Babici v MIMIA* [2005] FCAFC 77.

31. Departmental guidelines substantially reflect the policy intent contained in the relevant explanatory Statement, providing that “compelling circumstances” may include:
- the applicant and the sponsor have a child who is dependent on each of them; or
 - the death of the previous partner; or
 - the previous spouse or de facto partner abandoned the sponsor and there are children involved requiring care and support; or
 - if the new relationship is long-standing.
32. The present case is affected by the sponsorship limitation in r.1.20J. As acknowledged in the submissions to the Department and Tribunal, the sponsor has previously had two approved sponsorships that led to a grant of subclass 820 Partner visas. The sponsorships were granted in 1998 and 2009 respectively. The Tribunal therefore finds that the sponsorship limitation applies in the present case to preclude approval of the sponsorship unless the Tribunal is satisfied that there are compelling circumstances affecting the sponsor.
33. For the following reasons, the Tribunal is satisfied that there are compelling reasons affecting the sponsor the justify approval of the sponsorship.
34. The sponsor’s mother is 92 years old. She is a widowed Australian citizen who lives in a dwelling on the same block of land as that of the sponsor. The sponsor himself has three Australian citizen children residing in Australia. The sponsor is the only child of his mother, and takes complete care of her, with the assistance of the applicant. The sponsor’s mother has had a serious fall in December 2015, as a result of which she is unable to walk without assistance, either using a walking frame or a wheelchair. She also suffers from a number of other medical conditions including high blood pressure, and severe osteoarthritis. She is unable to take care of her basic housekeeping and cooking needs and activities of daily living, and the sponsor and applicant therefore undertake all of those duties for her. The sponsor’s mother is determined not to reside in a care facility and wishes to be cared for by her son, the sponsor, and the applicant at home. The sponsor is her registered carer. Accordingly, the sponsor does not wish to leave Australia to live offshore with his wife.
35. This information was provided to the Tribunal orally by the parties, as well is in a supporting statement from the sponsor. In addition, the Tribunal had before it a supporting statement from the sponsor’s ex-wife confirming this information, as well as various documents relating to the sponsors mothers health. After the hearing the Tribunal received further information in that regard including in particular a statement from the sponsor’s mother attesting to the support, help, comfort and companionship that the applicant provides to her.
36. The Tribunal accepts that at the time of this decision the parties have been in a long-standing relationship of about four years. For much of that time they have lived together in a joint household, and undertaken the role of caring for the sponsor’s mother. As well, the applicant assists the sponsor in relation to his business affairs. The Tribunal accepts the oral evidence that the sponsor, and his mother, would face significant hardship, particularly psychologically, but also financially, if he were forced to permanently relocate to the Philippines to live with the applicant.
37. The Tribunal has had regard to evidence before it regarding the circumstances that resulted in the breakdown of his earlier relationships, and the significant sadness and disappointment suffered by the sponsor which flowed from them.

38. Having regard to all of the circumstances the Tribunal is satisfied that there are compelling circumstances affecting the sponsor, and the sponsorship can be approved despite the operation of r.1.20J(1).
39. The sponsor therefore meets cl.820.211(2)(c) and cl.820.221(4)(a).
40. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

41. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2)(a) of Schedule 2 to the Regulations;
 - cl.820.211(2)(c) of Schedule 2 to the Regulations;
 - cl.820.221(1) of Schedule 2 to the Regulations; and
 - cl.820.221(4) of Schedule 2 to the Regulations

Fiona Meagher
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).